New Directions for U.S. Telecommunications Regulation?

The Comcast decision and the "Third Way"

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Abstract

A recent U.S. Court of Appeals decision, *Comcast versus FCC*, calls into question the FCC's authority to implement two of the most important policies of the Obama Administration, and of the Federal Communications Commission under the leadership of Chairman Julius Genachowski:

- The implementation of a formal, rule-based regime that would institutionalise protection of U.S. consumers against deviations from the principle of network neutrality; and
- The expansion of broadband coverage in the United States.

This court decision has effectively created a crisis for U.S. telecommunications regulatory policy, but the implications warrant careful analysis. Is *Comcast vs FCC* really the end of the world, or does it instead represent a chance for a new beginning?

Following *Comcast vs FCC*, there have been efforts in the U.S. Congress to change U.S. law to ensure that the FCC has the necessary authority to implement these programs. Meanwhile, Chairman Genachowski has proposed a sweeping re-thinking of the regulatory policy of the past ten years, the *Third Way*, that seeks to strengthen the underpinnings of the FCC's authority under *existing* law. Either approach represents a major re-thinking of current policy, and either is likely to have unforeseen consequences. This paper seeks to elucidate the implications of such a change.

Contents

1. Introduction

The Obama Administration, and the Federal Communications Commission under the leadership of Chairman Julius Genachowski,[1] have promoted two initiatives above all others:

- The implementation of a formal, rule-based regime that would institutionalise protection of U.S. consumers against deviations from the principle of network neutrality; and
- The expansion of broadband coverage in the United States.

A recent US Court of Appeals decision, *Comcast versus FCC*,[2] calls into question the FCC's authority to implement either of these policies. This court decision has effectively created a crisis for U.S. telecommunications regulatory policy, but the implications warrant careful analysis. Is *Comcast vs FCC* really the end of the world, or does it instead represent a chance for a new beginning?

Following *Comcast vs FCC*, there have been efforts in the U.S. Congress to change U.S. law to ensure that the FCC has the necessary authority to implement these programs. Meanwhile, Chairman Genachowski has proposed a sweeping re-thinking of the regulatory policy of the past ten years, the *Third Way*, that seeks to strengthen the underpinnings of the FCC's authority under *existing* law.

Either approach represents a major re-thinking of current policy, and either is likely to have unforeseen consequences. This paper seeks to elucidate the implications of such a change. We place greater focus on the Third Way because it has been more clearly defined to date than possible legislative solutions.

The balance of this introductory section provides greater clarity on the goals of the current FCC, on the Comcast decision and possible responses to it, and on the flow and content of the remainder of this paper.

Goals of the Obama Administration and the FCC

For decades, the United States was a hotbed of telecommunications regulatory innovation. US concepts of competition and market liberalisation have been warmly embraced by developed economies and by many developing economies throughout the world. US innovations in spectrum management have been widely studied and imitated, and US innovations in voice interconnection are enjoying increasing respect.

During the George W. Bush administration, however, US regulatory policy took a dramatic turn to the right, so to speak. Many of the FCC's key pro-competitive broadband access rules were withdrawn. The number of DSL lines provided by competitors, which had been steadily increasing after enactment of the 1996 Act, went into a steady decline. These regulatory changes, coupled with changes in the marketplace, led to profound changes in the competitive landscape. Most independent ISPs, competitive Local Exchange Carriers (CLECs), and even Inter-Exchange Carriers (IXCs) either went of business or were forced to merge.

[1] Some might object that the FCC, as an independent regulatory authority, implements policy quite independently from the administration that it serves. For reasons that we expand on later, we consider that view to be naïve.

[2] Decided 6 April 2010. See http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf.

The Network Neutrality debate in the United States is largely an outcome of these regulatory and market changes. Anticompetitive violations of network neutrality (1) are unlikely to be profitable where competition is sufficiently strong, and switching costs sufficiently low; and (2) had been in any case prevented by regulation prior to roughly 2005. The concentration of the market, coupled with the withdrawal of those regulatory safeguards, meant that there was no longer any assurance the incumbents with market power, and reduced constraints against its use, would not have the ability and the incentive to practice anticompetitive quality discrimination.[3]

The Obama Administration has also made it a major objective to expand the reach of broadband in the United States (1) to stimulate the economy by putting people to work, (2) to provide broadband service to remote parts of the U.S., and (3) to provide higher speed access to denser parts of the U.S. The FCC's recently released *National Broadband Plan* seeks to accomplish all three.

The Comcast decision and the Third Way

Comcast vs FCC has cast a large cloud over both of the key objectives of the Obama Administration and FCC Chairman Genachowski: (1) the implementation of network neutrality rules, and (2) the implementation of the FCC's National Broadband Plan. Yet the implications of Comcast, and also of potential responses to it, are complex and not yet well understood by the experts, to say nothing of the general public. Press reports to date have been, in our view, confused as to the likely effects of *Comcast*[4] and of likely responses to it.

The FCC and the Congress have any number of options potentially available to deal with the different challenges raised by *Comcast vs FCC*. Among them, some of the more promising and/or interesting include:

- The FCC could reverse itself and declare broadband Internet access, over whatever medium, to contain a *telecommunications service* and thus to be subject to regulation. This would effectively reimpose non-discrimination obligations under Section 202 of the Communications Act as amended, thus empowering the FCC to resolve network neutrality concerns.
- The FCC could bolster its authority under existing law to implement the National Broadband Plan.[5] This would enable the FCC to implement some, but perhaps not all, of those aspects of the National Broadband Plan that could in principle be implemented by the FCC without legislative action.
- The Congress could resolve these issues, either by implementing small fixes or by a massive overhaul of the Communications Act of 1934 as amended.

[3] See J. Scott Marcus, "Network Neutrality: The Roots of the Debate in the United States", *Intereconomics*, Volume 43, Number 1, January 2008; and J. Scott Marcus, Kenneth R. Carter and Christian Wernick, *Network Neutrality: Implications for Europe*, WIK, January 2009.

[4] See, for example, the New York Times, "U.S. Court Curbs F.C.C. Authority on Web Traffic", 6 April 2010; the BBC, "US broadband plan in 'legal limbo' after court ruling", 7 April 2010; and The Hill, "FCC Democrats determined to reclassify broadband", 6 April 2010.

[5] If the FCC were to declare broadband Internet access to include a telecommunications service, it should be possible to designate a broadband provider to be an Eligible Telecommunications Carrier (ETC), and thus eligible to receive subsidies from the Universal Service Fund (USF). In addition, the FCC could reverse itself and declare that Section 706 of the Telecommunications Act of 1996 does indeed provide a separate source of statutory authority (see Section 3).

Each of these methods entails both risks and opportunities. A re-classification of broadband services, for example, would necessitate careful, selective application of regulatory *forbearance* under Section 10 of the Communications Act as amended. One would need to very carefully assess which obligations were appropriate to broadband access, and which not. One particularly helpful provision of Section 10 of the Communications Act of 1934 as amended calls for an economic assessment of the impact of a proposed change on competition – if intelligently applied, this section could provide analytical rigor that the U.S. regulatory system desperately needs, and could bring it more in line with best practice regulatory systems in Europe and in other developed regions and countries.

The structure and flow of this paper

Section 2 explains the underpinnings of telecommunications regulation in the United States, particularly insofar as it relates to the Internet and to broadband access. Section 3 discusses the Comcast vs FCC ruling. Section 4 considers what U.S. telecoms regulation ought to be. Section 5 considers various options to address the challenges posed by Comcast vs FCC. Section 6 provides an intense analysis of the implications of FCC Chairman Genachowski's Third Way, proceeding section by section through Title II of the Communications Act of 1934 as amended; a more detailed assessment, in the form of a table, appears as an Annex to this paper. Finally, Section 7 provides concluding remarks.

2. Regulation of electronic communications in the United States

U.S. regulation of electronic communications in general, and of the Internet in particular, is complex. Unlike Europe, where regulations follow a small and well-defined set of economic principles, U.S. regulation is based on complex statutory language[6] that was designed long before the Internet was conceived,[7] and that can be extraordinarily difficult to apply to modern communications environments.

This section of the paper reviews the statutory foundations of telecoms regulations in the United States; explains the distinction between telecommunications service and information service under the Communications Act as amended; discusses the Stevens Report (which considered the implications of Voice over IP for Universal Service) and its implications for the classification of broadband Internet access; and reviews the deregulation of the George W. Bush years, and considers the implications and effects of that deregulation.

The legal basis of telecommunications regulation in the United States

The regulation of electronic communications in the United States is based primarily on the Communications Act of 1934. The Act has been repeatedly amended and expanded, most notably by the Telecommunications Act of 1996. Hardly any of these amendments deal explicitly with the Internet; consequently, policymakers have had to struggle to determine how to respond as communications networks are increasingly based on Internet technology and the *Internet Protocol (IP)*.

The Act as amended consists of multiple *titles*. *Title I* defines the *jurisdiction* of the FCC, sets forth key definitions, and establishes a range of rules of procedure. Contrary to popular belief, it does not define the FCC's *authority*, nor does it contain any significant explicit obligations on network operators.

Title II defines a wide range of obligations to be imposed on fixed or mobile network operators under various conditions. These obligations will tend to be familiar to all students of telecommunications regulation: access, interconnection, universal service, and the like.

Other Titles deal with management of the radio spectrum, and with broadcast policy including cable television; in the interest of brevity, we do not discuss them here, since they are not central to the issues that we will be discussing.

It is important to note that FCC is expected to implement provisions of the Communications Act as amended; it has only limited authority to craft new rules out of whole cloth, under a doctrine known as *ancillary authority*. The courts have consistently recognised the FCC's prerogative to create rules where necessary to fill gaps in the Act,

[6] See J. Scott Marcus, Federal Communications Commission (FCC) Office of Strategic Planning and Policy Analysis (OSP) Working Paper 36, "The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications," July 2002, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224213A2.pdf. The article and derivative works also appear in: *Rethinking Rights and Regulations: Institutional Responses to New Communications Technologies*, Ed. Lorrie Faith Cranor and Steven S. Wildman, MIT Press, 2003; in the *Journal on Telecommunications and High Technology Law* 111 (2003); and in the 2004 *Annual Review of the European Competitive Telecommunications Association* (ECTA).

[7] Even the Telecommunications Act of 1996 treats the Internet as at most an afterthought.

or to prevent properly grounded rules from being rendered ineffective; however, the FCC must be prepared in each case to demonstrate that the new rule is *ancillary to some expressly stated Congressional mandate*. The scope and the limits to this FCC ancillary authority are central to the current discussion in the United States.

Telecommunications Services versus Information Services

The Computer Inquiries were a series of FCC regulatory proceedings that addressed the perceived convergence between telecommunications and computing. The Computer Inquiries strongly influenced the Telecommunications Act of 1996.[8]

In Computer I, the Commission made two decisions that laid the foundation for its regulatory approach to services provided by computer data processing service providers.

First, the Commission concluded that the public interest would not be served by regulating such data processing services, since the provision of such services was deemed to be "essentially competitive."[9] Second, while the Commission determined that the participation of common carriers in the data processing market would benefit consumers, it expressed concern that common carriers might engage in unfair competition. The dangers of unfair competition, the Commission explained, relate "primarily to the alleged ability of common carriers to favour their own data processing activities by discriminatory services, cross-subsidization, improper pricing of common carrier services, and related anticompetitive practices and activities."[10] Accordingly, the Commission concluded that there was a need for competitive safeguards, and it required common carriers seeking to offer data services to do so through a structurally separate affiliate.[11] These safeguards were intended to ensure that carriers would not "give any preferential treatment to their data processing affiliates" and that competing data service providers would therefore have non-discriminatory access to the underlying communications components used in providing their services.[12]

The FCC continued its examination of these issues in the Computer II proceeding, which it initiated in 1976.[13] In Computer II, the Commission reaffirmed its basic regulatory approach to the provision of computer data services, but refined its analysis. In particular, the Commission, attempting to define and distinguish regulated telecommunications services and unregulated data services, created the categories of *basic services* and *enhanced services*.[14]

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[8] *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, (hereinafter Computer I Inquiry), 7 FCC 2d 11 (1966). This section draws on earlier work by this author in "The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications" (2002), and also on work by my FCC colleague Dr. Donald Stockdale.

[9] The FCC specifically found "that there is ample evidence that data processing services of all kinds are becoming available . . . and that there are no natural or economic barriers to free entry into the market for these services." *Computer I*, Tentative Decision, 28 FCC 2d 291, at para. 20 (1970).

[10] *Computer I*, Final Decision and Order, 28 FCC 2d 267, at para. 12 (1971).

[11] Ibid., at paras. 12 et seq.

[12] Ibid., at para. 21.

[13] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (Second Computer Inquiry),(hereinafter *Computer II*), Notice of Inquiry and Proposed Rulemaking, 61 FCC 2d 103 (1976).

[14] The FCC defined the term "basic" service, which referred to traditional common carrier telecommunications offerings as "the offering of transmission capacity for the movement of information." Computer II, Final Decision, (Computer II Final Decision), 77 FCC 2d 584, at para. 93 (1980). The

In 1986, the Commission further refined this line of reasoning with its Computer III decision.[15] With Computer III, the FCC offered regulated incumbents who sought to provide enhanced services the option of continuing to comply with Computer II's strict separate subsidiary requirements, or alternatively of complying with new "nonstructural safeguards" to prevent improper cross-subsidisation from regulated to unregulated portions of the firm.

Thus, in the Computer Inquiries, the FCC determined to subject only the basic transmission service to common carriage rules and obligations, while exempting enhanced services (which represented a blending of computation and communications) from common carrier regulation. The FCC reasoned that enhanced services did not themselves provide bottleneck facilities, but they depended on bottleneck facilities controlled by the traditional carriers. The FCC therefore concluded that enhanced services *per se* did not need to be regulated as basic (telecommunications) services. The equipment necessary to implement enhanced services was available on the open market. Barriers to entry were potentially low. The FCC chose to let market forces drive the evolution of enhanced services, without regulatory interference. Over the years, there has been widespread public support for this finding.

At the same time, the FCC continued to emphasize the need for competitive safeguards to ensure that telecommunications network operators did not use their bottleneck facilities to compete unfairly against unaffiliated enhanced service providers.

For European readers, it is worth noting that the essence of the European regulatory system is already arguably visible in these FCC rulings from the 1970s. Services that could be subject to significant market power were subjected to remedies; however, remedies would not be imposed on services in the absence of significant market power.

The Telecommunications Act of 1996 subsequently formalized and codified the distinction between basic services (renamed *telecommunication services*) and enhanced services (renamed *information services*). The Act defines an information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..."[16]

The Stevens Report and its approach to Internet access

The Computer I, II and III rulings and their embodiment in the Telecommunications Act of 1996 represent the underpinnings of U.S. policy toward the Internet. On the one hand, they led to the view that the Internet should be viewed as an enhanced service, and that the Internet consequently should not itself be subject to significant regulation. On the other hand, they sought to ensure that the traditional carriers would not be permitted to withhold or to discriminate in the provision of the building blocks essential to the creation of the Internet.

In 1998, the FCC prepared a report to Congress, commonly referred to as *Stevens Report*, on the likely impact of the Internet. The Congress's terms of reference to the

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Commission defined "enhanced services" as: … services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information. (46 C.F.R. § 64.702(a)).

[15] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, (*Computer III*), 104 FCC 2d 958 (1986), vacated California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[16] See the definitions in the Communications Act of 1934 as amended, codified at 47 U.S.C. §3(20).

FCC required that they provide "the definitions of 'information service', 'telecommunications', 'telecommunications service', … [and] the application of those definitions to mixed or hybrid services and the impact of such application on universal service definitions and support, and the consistency of the Commission's application of those definitions".[17]

The Stevens Report confirmed that Internet services should continue to be viewed as information services, consistent with longstanding FCC practice.[18] The also found that "… the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications' rather than 'information service …'". The Stevens Report, however, went beyond the Computer Inquiries to argue that Internet access should be viewed as an (unregulated) information service: "The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an 'information service.'" Inasmuch as the FCC had previously ruled that information services and telecommunications services were mutually exclusive definitions, if Internet access were an information service, it could not be a telecommunications service, nor could it constitute "telecommunications".[19]

They based this conclusion on grounds that should seem dubious to most readers today: that ISPs often also provide web hosting services and e-mail services. These services are often, but by no means always, provided with Internet access, are widely available from third parties, and were never in reality "inextricably intertwined" with Internet access.

The finding was questionable on a second ground. It is difficult to see how the provision of Internet access could fail to constitute "telecommunications", which is defined as "… the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[20]

The Stevens Report includes a lengthy discussion of "hybrid services", and it is here that the third questionable assumption appears. "It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail. Since Computer II, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But

[17] The report was prompted by concerns that migration to Voice over Internet Protocol (VoIP) would eventually undermine support for the Universal Service Fund.
[18] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress (hereinafter the *Stevens Report*), 13 FCC Rcd 11501, 11516-17 (1998), FCC document 98067.pdf.
[19] Ibid., para. 33.
[20] Communications Act of 1934 as amended, codified at 47 U.S.C. para. 3. We note in passing that the Stevens Report includes an extended but inconclusive discussion on the relevance of protocol processing to the classification of Internet access (para. 32). Significantly, they clarify the FCC's practice by observing that "protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user …"

the matter is more complicated when it comes to offerings by facilities-based providers."

This distinction between facilities-based and non-facilities-based can only make policy sense if one assumes that it corresponds to a (possible) difference in whether the network operator in question possesses market power. Indeed, *that* is the distinction that would be most true to the logic of the Computer Inquiries, as explained in the previous section.

Indeed, the Stevens Report relies to a significant degree on the premise that "…Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers …" Presumably, the underlying telecommunications provider possess whatever market power may be relevant, not the Internet access service provider. But the Stevens Report never reaches the question of how to deal with facilities-based providers of Internet access, who might very well possess market power.

In fairness to the FCC, one should note that the long term consequences of the Stevens Report were unintended. First, that the Stevens Report was a report to the U.S. Congress, not a regulatory proceeding. It had no regulatory weight. Second, it was intended by the FCC to serve as a short term stopgap, surely for no more than a year or two, in order to prevent premature regulation of the Internet backbone. Nobody at the FCC in 1998 could have predicted that the Stevens Report would cast a long shadow over Internet regulation for the subsequent twelve years.

Deregulation during the Bush years

During the business-friendly years of U.S. President George W. Bush (2001-2008),[21] the FCC embarked on a series of proceedings to deregulate broadband Internet access, or to ensure that regulation could never be applied.

In 2002, access to the Internet sold bundled with cable modem access was declared to be an information service, thus exempting it from regulation as a telecommunications service.[22] This set a crucially important precedent, but it was not seen as radical at the time inasmuch as Internet access over cable television had never been subject to regulation as a telecommunications service in the first place.

In 2005, Internet access via telecommunications sold bundled with xDSL access was declared to be an information service, again exempting it from regulation as a telecommunications service.[23] Network operators who wished to do so could, however,

[21] The FCC is a nominally independent regulatory authority, but like all U.S. government agencies it is strongly influenced by politics at the national level. This was particularly pronounced during the George W. Bush years, but it was also very much the case during the prior Democratic administration. Cf. Reed Hundt (2000), *You Say You Want a Revolution*, Yale University Press.

[22] *Cable Modem Declaratory Ruling and Notice of Proposed Rulemaking*, 14 March 2002.

[23] *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises;*

continue to offer DSL as a telecommunications service, and a significant number of smaller rural network operators chose to do so.[24]

The logic of these rulings drew heavily on the reasoning in the Stevens Report. Broadband Internet access was viewed as a single service, comprising information services delivered by means of underlying telecommunications. The combination was classified in its entirety as an information service, and thus not subject to any explicit regulations. This approach should have been highly suspect at the time; nonetheless, it survived review by the courts. Concerns that should have received greater attention at the time include:

- The very definition of the provision of Internet access was (intentionally) flawed. The core definitional feature surely should have been *access* to the Internet (i.e. transmission), not the provision of e-mail services. A service provider that offers *only* e-mail services, and *only* to customers who obtain their Internet access in some other way, does not provide Internet access.
- The claim (grounded in the Stevens Report) that Internet access was inextricably intertwined with e-mail and web hosting was clearly specious, inasmuch as numerous independent service providers offered both without offering Internet access; furthermore, numerous Internet service providers offered Internet access separately from e-mail services and web hosting.
- Even if one were to accept *arguendo* that Internet access service together with e-mail and web hosting were a single, inseparable service comprising elements of both telecommunications service and information service, the proper conclusion would have been to have classified them as a telecommunications service. The Stevens Report ignored the underlying telecommunications solely on the basis that it was often provided (then, but not so often now) by a *different company* that was already subject to regulation as a provider of telecommunications services. Moreover, it is clear that last mile wired facilities are likely (today and for the foreseeable future) to be associated with market power, at least in portions of the national territory; thus, if it were necessary to lump the purportedly inextricably intertwined service into a single definitional "bucket", the only sensible public policy conclusion would have been to place it in a category that enabled regulation if necessary to address that market power.

The approach that the FCC took instead should be understood to imply that key decision-makers at the FCC believed that no regulation was likely to ever be necessary. The FCC would have had various means of reducing the regulatory burden associated with broadband for cable television and telecommunications network operators. Arguably, they chose the most extreme. Rather than selectively eliminating individual onerous obligations (through a mechanism known as *forbearance*, discussed later), they

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Consumer Protection in the Broadband Era (hereinafter *Computer Inquiries Order*), adopted 5 August 2005, released 23 September 2005.

[24] Meanwhile, other FCC actions had lifted local loop unbundling obligations for fibre-optic access, while retaining them for copper-based access; had effectively eliminated shared access (line sharing) obligations; and had eliminated obligations to offer the most popular form of unbundled loop, UNE-P.*In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, (hereinafter the *Triennial Review Order*, or *TRO*), adopted 20 February 2003, released 21 August 2003. Shared access had been remanded to the FCC by the courts; this order declined to reinstate it on a firmer foundation.

instead chose to place Internet access services (together with associated e-mail and web hosting) in their entirety into a category where no significant *current* regulations existed, and where it would be difficult if not impossible to impose *future* regulations. Moreover, the FCC pre-empted regulation at the state level.

The effects of deregulation

US regulatory policy thus took a surprising turn starting in roughly 2002. Many of the key pro-competitive rules that the FCC had introduced over many years, and that had been formalized with the Telecommunications Act of 1996, were withdrawn in regard to broadband access during the 2002-2005 period. The number of DSL lines provided by competitors, which had been steadily increasing after enactment of the 1996 Act, went into a steady decline. These regulatory changes, coupled with changes in the marketplace, led to profound changes in the competitive landscape. Most independent ISPs, competitive Local Exchange Carriers (CLECs), and even Inter-Exchange Carriers (IXCs) either went of business or were forced to merge.

At the time of the Stevens Report, a large fraction of American consumers were served by literally thousands of small dial-up *Internet Service Providers (ISPs)*. Today, a rigorous economic analysis would likely show that most of the U.S. is served by a series of non-geographically overlapping effective duopolies, with exactly one fixed telephone company and one cable operator. In some areas, only one of these two are present, which would tend to imply an effective monopoly. In much of the U.S., other options are available; however, for whatever reason (be it capacity, price, coverage, quality, or simply size of customer base), the competitors do not represent a significant competitive check on the behaviour of the *de facto* duopolist incumbents.

Challenges raised by deregulation

The information services classification meant that providers of broadband Internet access were not necessarily subject to obligations under CALEA to proactively instrument their respective networks for purposes of lawful intercept (i.e. subject to a warrant or suitable due process protections) for law enforcement. In a post-September 11 U.S., the FBI was understandably distressed.

The information services classification also raised questions about obligations for VoIP service providers to provide access to emergency services (i.e. telephone number 911 in the U.S., similar to 112 in Europe).

There were further questions as the FCC considered whether VoIP service providers should be obliged to make payments into the Universal Service Fund; in this case, however, the Act as amended gave the FCC explicit authority to require firms that offer telecommunications, but not telecommunications service, to pay into the fund.

As the FCC in the Obama era took an increasing interest in issues of network neutrality, the same questions re-emerged. Did the FCC in fact have authority to craft rules for providers of broadband Internet access services?

3. The Comcast decision

On 6 April 2010, a U.S. Court of Appeals released an important decision, *Comcast vs FCC.*[25] The ruling casts into sharp relief the question of the FCC's ability to craft rules to address Network Neutrality challenges. It may also raise questions about the FCC's ability to implement the National Broadband Plan.[26]

We will begin by providing background on the case, and by clarifying what exactly the ruling means. We will then review the effect on the FCC's intended Network Neutrality ruling, and on the National Broadband Plan.

Background

The FCC had previously found that Comcast (a large cable television company, and the largest provider of home broadband Internet access in the US) had interfered with the ability of their broadband customers to access peer-to-peer applications such as BitTorrent.[27] Comcast agreed to end the practice; however, they challenged the legal basis on which the FCC had ordered them to do so.

The FCC had previously issued an Internet Policy Statement that argued that "… consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice …"; however, the FCC had never formalized this statement of principles into explicit rules. For telecommunications services (including conventional telephone calls), certain forms of anticompetitive price or quality discrimination are prohibited under US law;[28] however, as previously noted, the FCC had previously ruled that broadband Internet access, whether over telecommunications lines or over cable television, is not a telecommunications service but rather a largely unregulated information service. The relevant portions of Communications Act as amended were thus inapplicable to broadband Internet access services. Since the FCC had never issued an explicit rule preventing blockage of Internet access to applications, devices or content, it was not clear what rule, if any, Comcast had violated.

Comcast went to court to argue that the FCC had acted improperly, first by enforcing a "rule" that was not in fact a rule, and where the FCC had circumvented the normal bureaucratic safeguards;[29] and second, that the FCC lacked authority to issue such a rule for an information service in the first place.

The ruling

The court agreed that the FCC had failed to demonstrate its authority, and therefore vacated (lifted) the FCC's order. As a regulatory authority, the FCC is supposed to

[25] Decided 6 April 2010. See http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf.
[26] See, for example, the New York Times, ""; the BBC, "US broadband plan in 'legal limbo' after court ruling", 7 April 2010; and The Hill, "FCC Democrats determined to reclassify broadband", 6 April 2010.
[27] For further background on the case, see J. Scott Marcus, Kenneth R. Carter and Christian Wernick, *Network Neutrality: Implications for Europe*, WIK, January 2009, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1522039.
[28] See sections 201 and 202 of the Communications Act of 1934 as amended.
[29] Notably, the Administrative Procedures Act.

implement provisions of US law. As previously noted, it also has ancillary authority that enables it to craft new rules in support of explicit legal mandates, or to ensure that its actions in support of a legal mandate were not circumvented or made meaningless. In this case, the court found that the FCC had failed to tie its assertion of ancillary authority to any "statutorily mandated responsibility."[30] The court thus found that the FCC's purported grounds were nowhere near sufficient.

As previously noted, the FCC had previously found that broadband services, whether delivered over cable or telecommunications, were in an unregulated category known as *information services*. Information services are within the jurisdiction of the FCC, but the Communications Act places scarcely any specific obligations on them. This classification meant that the Act's non-discrimination obligations were inapplicable to broadband access services. Thus, the obvious source of authority was inapplicable.

The FCC advanced many other purported grounds, but the court did not find any of them to be persuasive.

Contrary to what many have argued, Comcast vs FCC was *not* a major departure – it is a confirmation of long-standing US case law. What the court found was predictable, and arguably even inevitable. Moreover, if the FCC had somehow managed to be sustained on its exercise of ancillary authority, it would have probably been overturned in any case on the other prong of Comcast's argument, namely that it could not issue case-by-case rulings about purported violations without first establishing a set of rules.

Implications for network neutrality

Network Neutrality has been hotly debated, both in Europe and in the United States. In attempting to dissect the issues, it is important to distinguish among the many different aspects of network neutrality.[31]

Network neutrality reflects concerns that certain network operators, especially broadband network operators, would favour certain content, applications, or devices over others. Whether this should be viewed as problematic in a particular instance depends a great deal on the context. In general, price and/or quality discrimination in a competitive market can benefit consumer and producer welfare. Where markets are concentrated, however, discrimination can be used for anticompetitive purposes. Notably, a network operator with sufficient market power could favour its own or affiliated content, applications and devices over those of competitors, to the detriment of competition and of consumer welfare.

The network neutrality debate in the United States is largely an outcome of the deregulatory changes previously noted. Anticompetitive violations of network neutrality are unlikely to be profitable (1) where competition is sufficiently strong, and switching costs sufficiently low; and (2) had been in any case prevented by regulation prior to roughly 2005. The withdrawal of regulatory safeguards, coupled with the resultant increasing concentration of the market, meant that there was no longer any assurance that incumbent broadband network operators with market power, and reduced

[30] The court did not reach the question of whether the FCC could take an enforcement action without first crafting a rule.

[31] We will only reproduce the most essential arguments here. For a more detailed treatment, see: J. Scott Marcus, "Network Neutrality: The Roots of the Debate in the United States", *Intereconomics*, Volume 43, Number 1, January 2008; and J. Scott Marcus, Kenneth R. Carter and Christian Wernick, *Network Neutrality: Implications for Europe*, WIK, January 2009. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1522039 .

constraints against the use of that market power, would not have the ability and the incentive to practice anticompetitive quality discrimination.

The Comcast ruling is likely to stand. It serves not only to effectively eradicate the FCC's ruling against Comcast (which has no real effect in any case, since Comcast has already complied and has indicated that it does not intend to repeat the conduct in question), but more significantly also effectively prevents the FCC from imposing general rules against anticompetitive discrimination. Unless the FCC were to first lay the necessary groundwork, any such rules would likely be invalidated on the same grounds.

Implications for the National Broadband Plan

Meanwhile, the Obama Administration has made it a major objective to expand the reach of broadband in the United States (1) to stimulate the economy by putting people to work, (2) to provide broadband service to remote parts of the US, and (3) to provide higher speed access to denser parts of the US. The FCC's just-released National Broadband Plan[32] seeks to accomplish all three.

As for the implications of *Comcast vs FCC* for the Broadband Plan, two observations are in order. The first is that a large proportion of what the Broadband Plan put forward was never within the FCC's jurisdiction in the first place For those portions, this ruling makes no difference. The second observation is perhaps the only surprise in the *Comcast vs FCC* ruling: The quite substantial statutory mandates (to enhance the deployment of advanced communication services, i.e. broadband Internet access) that appear in so-called Section 706 of the Telecommunications Act of 1996 were undermined by the FCC itself in a 1998 order, the *Wireline Deployment Order*. The FCC said in 1998 that the 706 language "does not constitute an independent grant of authority". The language that was thus crippled seems to quite clearly constitute an independent grant of authority,[33] and to potentially represent some of the most useful language in the Act as amended for justifying portions of the Broadband Plan. The FCC could reverse its previous position, but it cannot do what it attempted to do, which is to rely on 706 as an independent grant of authority without first reversing its previous position explicitly. Per the Comcase *ruling*, "Agencies may not ... depart from a previous policy *sub silentio*."

[32] See http://www.broadband.gov/.

[33] Section 706 says in part: "[T]he Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

4. What regulatory options should pertain to Internet access in the U.S.?

Before proceeding to consider what regulatory fix would be most appropriate, it is necessary to first consider: What *should* the objectives of regulation of electronic communications in the United States be?

As regards Internet-based services, this is by no means a settled matter in the U.S. A moderate degree of consensus exists for some potential rules, while others would likely be hotly debated. Few Americans would accept the premise that the U.S. should abide by some notion of international best practice; moreover, given the many unique characteristics of the U.S. telecommunications market, there might even be some justification for that view. Thus, it is necessary to go back to first principles and ask what regulation of Internet-based services in the U.S. might be meant to achieve.

The discussion that follows focuses, not necessarily on all aspects of regulation, but rather on those that have been most problematic in the context of Internet-based services. These are access remedies, network neutrality, universal service, high speed (fibre-based) Internet access, lawful intercept, and Voice over IP (VoIP) access to emergency services, in that order. A final sub-section sums up what, in our view, regulation in the U.S. should seek to achieve for Internet-based services.

Access remedies

Following the enactment of the Telecommunications Act of 1996, the Clinton-era FCC imposed the range of competitive last mile access remedies called for in the Act. This included Local Loop Unbundling (LLU) and shared access.[34] Implementation was slowed, as in many other countries, by a series of court challenges that could be viewed as strategic litigation. Nonetheless, competitive firms (known as CLECs) gradually made modest progress, achieving a market share of 7% of all xDSL lines by 2003.

A series of FCC decisions from 2002 to 2005 lifted most of these obligations. The Triennial Review removed ULL obligations from fibre-based telecommunications access. A court remand to the FCC, coupled with a failure by the FCC to reinstate the rule in that same Triennial Review, resulted in complete withdrawal of shared access obligations. Most CLECs – many of which were already experiencing difficulties due to the "dot-com bust" of 2001 – either went out of business, or else were acquired. The competitive share of ADSL lines steadily declined to less than 3% by 2010.[35]

It is worth noting that Internet access over cable television, which constitutes more than half of a broadband Internet access in the United States, was never subject to last mile access remedies in the first place.

The net effect of all of this is that neither cable nor telecoms are subject to effective last mile access remedies in the U.S., in sharp distinction to most developed countries. In effect, most of the geographic territory of the U.S. constitutes a series of non-geographically overlapping effective duopolies, where the only competition that matters is between one telephone company and one cable operator. One could argue that this

[34] In this paper, we strive to use European or global names, and to avoid U.S.-specific jargon.

[35] For a more complete discussion, see J. Scott Marcus, "Is the U.S. Dancing to a Different Drummer?", *Communications & Strategies*, no. 60, 4th quarter 2005. Available at: http://www.idate.fr/fic/revue_telech/132/CS60%20MARCUS.pdf. Also available in *intermedia* (the journal of the International Institute of Communications), vol. 34, no.3, July/August 2006.

represents far too little effective competition; however, it is important to bear in mind that duopoly in the U.S., where nearly every household is passed by Internet-capable cable television, is quite different from the effective monopoly control that most countries would experience in the absence of last mile access remedies.

Suffice it to say that the most appropriate long term direction as regards last mile access in the U.S. remains unsettled. In the National Broadband Plan, the FCC committed to re-examine the competitive landscape in the United States. That commitment now seems to be held hostage to Network Neutrality, the Comcast decision, and a new proposed way forward by FCC Chairman Genachowski called the "Third Way" discussed in Section 5 of this report.

Network Neutrality

Network neutrality means many different things. All of them have to do, in one way or another, with providing consumers with non-discriminatory access to the Internet.

In our view, quality discrimination *per se* should not be viewed as a problem.[36] In the absence of market power, quality (and price) discrimination generally enhances consumer welfare. Deviations from strict neutrality raise many potential issues (some related to two-sided markets, others to consumer protection), but in the absence of market power either there would be no significant need for regulatory action, or else a modest regulatory intervention (for example, to ensure that consumers are well-informed and can switch Internet access providers at low cost) would suffice. This is largely the case in Europe.

In the U.S., precisely because of the concentration of the market for broadband access noted earlier, there are additional risks. A broadband network operator with last mile market power could conceivably impede the ability of its customers to access content or applications or to use devices that compete with its own affiliated content, applications, or devices. This would constitute a form of vertical market foreclosure. These behaviours clearly have the potential to undermine consumer welfare.

Even so, one could argue that imposition of regulatory remedies to deal with network neutrality in the U.S. is at least premature. There have been relatively few overt incidents to date, and the costs of those incidents to consumers have been limited.

The FCC has moved to impose explicit network neutrality as a series of explicit regulatory obligations. The process has been stalled by the Comcast decision, which relates directly to network neutrality obligations. Nonetheless, it is fairly clear that a 3-2 majority of Commissioners (specifically the Democrats) favour explicit network neutrality regulation, while the Republicans oppose it.

It is fairly clear that if the U.S. had access remedies comparably effective to those in Europe, then there would be no need for intensive network neutrality regulation. Modest consumer protection rules, such as ensuring that consumers are well informed as to the practices of their respective network operators, and that they can change network operators at low cost, would probably suffice.

[36] For a more comprehensive discussion of network neutrality, see J. Scott Marcus, "Network Neutrality: The Roots of the Debate in the United States", *Intereconomics*, Volume 43, Number 1, January 2008; and J. Scott Marcus, Kenneth R. Carter and Christian Wernick, *Network Neutrality: Implications for Europe*, WIK, January 2009, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1522039 .

Universal service

Most countries place obligations on network operators of last resort to provide basic telephone service at a reasonable cost to those who cannot afford it, or to those who live in areas that would otherwise be prohibitively expensive to serve. Different countries strive in different ways to make the impacted network operators whole.

In the U.S., it was already clear some years back that the funding pool for universal service would experience a shortfall if broadband access and Voice over IP were not included.

This is one of the very few areas where the Communications Act as amended gives the FCC explicit discretion to act. The FCC could require contributions to fund from telecommunications providers that are not telecommunications service providers. This was imposed on broadband access providers and VoIP service providers in June 2006, and is largely a settled matter. The Comcast decision did not introduce doubt as regards this decision.

It is also increasingly clear that, going forward, the voice service should no longer be the sole focus of universal service. Broadband Internet Protocol (IP) access is the service that needs to be universally available. Once a consumer has broadband access, a voice service overlay riding over the top of the broadband need not cost very much.

High speed (fibre-based) Internet access

There is also an argument that government has a role in promoting deployment of the next generation of IP-based access, i.e. fibre-based access. In most countries, this is treated more as a matter of industrial policy than of regulation, but it is nonetheless relevant to the discussion. The FCC's *National Broadband Plan*[37] puts forward a number of recommendations that are relevant.

Lawful intercept

When the FCC declared broadband Internet access over telephone lines to be an information service, and thus not subject to regulation as a telecommunications service, it is not clear that they fully considered the impact on lawful intercept (i.e. wiretapping, typically subject to a warrant, for purposes of law enforcement). The relevant law (CALEA) imposed obligations on telecommunications services.

The U.S. FBI and a range of law enforcement agencies were deeply troubled by the effective withdrawal of obligations for network operators providing broadband services to instrument their networks to facilitate lawful intercept.

The FCC was able to finesse matters, recognising that CALEA was a distinct statute with its own definition of telecommunication services. They managed to impose obligations on providers of broadband Internet access, and on providers of VoIP. In both cases, the legal rationale was somewhat tortured, and might not have withstood a determined challenge.

VoIP access to emergency services

We have argued that the initial imposition of obligations on VoIP service providers to enable their customers full access to emergency service were poorly thought out, and harsh to the point of weakening competition and thus negatively impacting consumer

[37] See www.broadband.gov.

welfare.[38] Nonetheless, at this point the damage has been done, and the rules enacted should remain in force.

Summary

We would suggest that the appropriate goals for the US would be:

- **Access remedies:** We think that it may eventually be necessary to impose last mile access obligations; however, there is no clear consensus to do so today, and this does not seem to be high on the agenda of the current FCC commissioners. Nonetheless, this is probably the most important open issue on the agenda of Internet regulatory issues for the United States, with potential consequences many times greater than the other issues discussed in this section. It would be singularly unfortunate if the ultimate outcome were to be pre-judged in a largely unrelated set of regulatory changes.
- **Network neutrality:** If access remedies were in place, then only mild network neutrality remedies would be called for. As things stand, more intensive remedies may possibly be necessary.
- **Universal service:** The current imposition of obligations on broadband and VoIP providers to make contributions should be carried forward. The scope of universal service should be expanded, as proposed in the National Broadband Plan, to focus on broadband rather than on (fixed network) voice.
- **High speed (fibre-based) access:** Many of the recommendations in the National Broadband Plan are appropriate. Few if any of these initiatives depend on one way or another on the response to the *Comcast* decision.
- **Lawful intercept:** Obligations on broadband access providers and on VoIP service providers should remain in place.
- **Emergency services:** The obligations on VoIP service providers that enable calls to domestic phone numbers to provide access to emergency services should remain in place.

[38] J. Scott Marcus, "Voice over IP (VoIP) and Access to Emergency Services: A Comparison between the U.S. and the UK", *IEEE Communications Magazine*, August 2006.

5. Two ways forward, three, or four?

It is fairly clear that the set of regulatory obligations described in Section 4 does not exactly match either of the two profiles in the Communications Act of 1934 as amended.

- Under the present definition of broadband Internet access as an information service, certain obligations that are already in force were imposed with great difficulty, and might not withstand a determined court challenge. Imposition of new rules to address network neutrality, if deemed appropriate, would be difficult or impossible.
- Redefining broadband Internet access, in part or as a whole, to be a telecommunications service would immediately subject it to a great many obligations that are clearly inappropriate.

Neither approach, in and of itself, achieves the objective of imposing a well thought out and tailored set of obligations on Internet-based services. For that matter, nobody would seriously put either approach forward today.[39]

A first, second, or third way?

If the objective is to impose a particular, tailored set of obligations on Internet access and related services, there are essentially three possible approaches:

- Within the framework of existing law, to start from today's premise that broadband Internet access is an information service, and to selectively impose any obligations that are felt to be needed.
- Within the framework of existing law, to redefine part or all of broadband Internet access as a telecommunications service, to alleviate any obligations deemed to be inappropriate, and to modify others as needed to make them suitable for an Internet-based service.
- To craft new law that imposes precisely the obligations that are needed.

The first approach starts with no obligations, and proceeds by addition; the second starts with all obligations that could possibly be needed, and then eliminates those that are not needed.

The first way: imposing obligations on providers of an information service

The First Way is largely the system that we have today. Providers of broadband Internet access services are not *per se* subject to significant obligations; however, individual obligations have successfully been imposed using a range of rationales.

The most successful examples to date do not literally depend on the FCC's ancillary authority. For example, imposition of payments into the Universal Service Fund was based on explicit discretion granted to the FCC in the Act as amended. Imposition of

[39] As a matter of fact, the FCC *did* put the second alternative forward as a purported "second way", but primarily as a rhetorical device. They were setting up a straw man in order to later knock it down. See Julius Genachowski, "The Third Way: A Narrowly Tailored Broadband Framework", at: http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html.

CALEA obligations reflected CALEA's somewhat different statutory definition of a telecommunications service from that in the Communications Act. These orders seem unlikely to be overturned.

The key message of the *Comcast* ruling is that any FCC authority that is not solidly grounded in a explicit statutory mandate must be clearly and unambiguously linked to a statutory mandate. Alternatively, as the *Comcast* ruling observes, the FCC must show that the action is necessary to prevent some other FCC action that is properly grounded from being rendered ineffective.

In the case of Network Neutrality obligations, it is difficult to see where this authority might originate. If the FCC had identified such a source, they presumably would have already used it in the *Comcast* case.

For broadband, Section 706 of the Communications Act provides considerable authority to which other FCC actions could be ancillary. The FCC could in principle "… take immediate action to accelerate deployment of [broadband Internet access] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." That potentially covers a great deal of ground; however, to invoke this authority, the FCC would have to (1) reverse its previous claim that this section provides no independent source of authority; and (2) find that broadband Internet access is not "… being deployed to all Americans in a reasonable and timely fashion …" There is considerable room for debate as to what constitutes "reasonable and timely"; nonetheless, satisfying the second prong would likely raise numerous practical and political difficulties for the FCC.

Thus, there would be considerable doubt as to whether the FCC could successfully impose new Network Neutrality rules, and there would be some new doubt introduced as regards those portions of the National Broadband Plan that depend on FCC actions. More generally, the FCC's ability to craft any new obligations that depend on ancillary authority has been called into question.

A related concern raised by the FCC and by others is that, in light of the Comcast decision, any new obligations that they attempt to impose under ancillary authority are likely to be challenged, and some significant fraction of the challenges are likely to be sustained. This implies considerable regulatory uncertainty, and a lack of clarity as to whether the FCC is able to take meaningful action at all in regard to broadband Internet access providers.

The Third Way: removing obligations from a telecommunications service

The "Third Way" alternative put forward by FCC Chairman Julius Genachowski and by FCC General Counsel Austin Schlick[40] would go about things in exactly the opposite way. The portion of broadband Internet access that falls within the scope of telecommunications (i.e. the part associated with data transmission and not with, say, e-mail running on top of that transmission) would be re-classified as a telecommunications service, and would thus by default be subject to a wide range of

[40] See Julius Genachowski, "The Third Way: A Narrowly Tailored Broadband Framework", at http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html; and Austin Schlick, "A Third-Way Legal Framework For Addressing The Comcast Dilemma", at http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html.

obligations. The FCC would then forbear from regulation, except in the case of a small number of obligations that it deems necessary to apply to providers of broadband Internet access.

In principle, this achieves exactly the same objectives as the first way; however, *once the overall approach has passed legal muster*, subsequent individual FCC decisions are much less likely to be successfully challenged in the courts. The FCC's overall authority to regulate would be clearly established at the outset.

Relative to a number of existing obligations, such as CALEA or access to emergency services, there is probably little difference. They would be on a somewhat firmer footing under this alternative, but as things stand they are unlikely to be successfully challenged in any case.

The ability to impose new obligations for Network Neutrality would be clear-cut, since they would implement well-established authority in Sections 201 and 202 of the Act as amended.

The ability to implement obligations relative to the National Broadband Plan would be somewhat greater than under the current arrangements; however, each individual potential action would have to be considered individually. For example, implementation of the Third Way would not in and of itself appear to make much difference in the FCC's ability to implement the spectrum aspects of the National Broadband Plan.

An interesting characteristic of the Third Way is that the decision to relieve broadband Internet service providers from obligations would rest on Section 10 (*Forbearance*) of the Act as amended. This section explicitly requires the FCC to "…consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." Thus, proper application of this section should in principle oblige the FCC to apply precisely the kind of economic analysis that has conspicuous by its absence in so many of its broadband proceedings over the past eight years. This is one of the most promising sections of the entire Communications Act, but to date it has been one of the least used.

The white paper by FCC General Counsel Schlick proposes to forbear from all but six sets of obligations. Sections 201, 202, and 208[41] would collectively enable Network Neutrality rules, among others. Section 254 deals with universal service; however, as noted, the FCC's desire to include broadband Internet access within the scope of Internet service does not necessarily depend on the Third Way, and would not automatically be achieved by its implementation. He has also proposed that Section 222, which deals with the privacy of customer data, and Section 255, which requires that equipment be usable by consumers with disabilities, should apply. This analysis, as far as it goes, seems to be in order.

The Schlick paper also "counts noses" among Supreme Court justices, and concludes that a Third Way ruling would likely obtain a majority in the Supreme Court (which is where a court challenge would be ultimately resolved).

The Schlick paper claims that the Third Way would have no impact on obligations to provide unbundled access to, as a notable example, the local loop. This may literally be true; however, the number of entities able to request access under Section 251(c)(3) would certainly change, and there might be other implications as well.

[41] Section 208 deals with complaints and investigations.

Schlick argues, however, that forbearance decisions would be extremely difficult to overturn. This seems to us to be potentially worrisome. The National Broadband Plan makes the following recommendation:

- RECOMMENDATION 4.7: The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.

If Mr. Schlick is correct, then it is possible that no forbearance is required in regard to relevant wholesale obligations. If forbearance is required, then it would be perverse to lock in current arrangements at the very point in time where the FCC is calling for a comprehensive review of those arrangements.

A fourth way: new legislation

The requirements expressed in Section 4 could obviously be addressed by means of new legislation. One could envision a new Communications Act; however, it is much more likely that any necessary changes would be implemented as amendments to the existing Communications Act.

In principle, this is clearly the best and most appropriate solution. In a new Act, Congressional intent could be made clear, in which case the likelihood of FCC actions being overturned by the Courts would be minimal. A new Act could provide precisely the palette of regulatory obligations that would be needed.

The American baseball catcher and coach Yogi Berra is supposed to have said: "In theory, there is no difference between theory and practice. In practice, there is."

In practice, we have any number of concerns about a possible re-write of the Communications Act. In essence, the time may not be right. Our thoughts are conditioned by the following observations:

- First, we note that it took the Congress about ten years to pass the Telecommunications Act of 1996. It was one of the most heavily lobbied bills in U.S. history. That kind of climate is not conducive to sober, rational policymaking.
- Second, we observe that the political climate in the U.S. is particularly toxic just now, probably much more so than it was over most of the Twentieth Century.
- Third, we note that the Act as it stands is huge, unwieldy, and practically incomprehensible. Moreover, large parts of "the Act" writ large are not even visible in the Act itself, but rather are embedded in court decisions and elsewhere.[42] The core of the Act dates to 1934, and that was based on still older chestnuts. Rationalisation, reorganisation and simplification are long overdue.
- Fourth, we continue to feel that the decision to impose, or not to impose, access remedies is the most important challenge facing U.S. policymakers. The current operative decisions were, as previously explained, never properly analysed. The current experiment, if one can call it that, may not have been running long

[42] Consider, for example, the notion of private carriage, which is an artefact of the *NARUC I* case. It does not appear in the Act at all.

enough to generate an unequivocal outcome. This issue should not be revisited until it can be *definitively* resolved.

Each of these four factors poses its own challenges for a comprehensive legislative solution. The long lead time to agree on an overhaul of the Act is probably much too long, particularly if it were to mean that initiatives to foster greater broadband deployment go on hold. The toxic political climate means that any attempt at comprehensive reform is likely to produce an unacceptably compromised product. The prospects for successful streamlining and simplification of the Act in the present climate are in our judgment nil – there is no consensus, either among politicians or among U.S. experts, as to how to re-craft the Act to make it more manageable. There is also little willingness to look outside the borders of the U.S. to take international best practice on board. And finally, as regards access remedies, there is considerable reason to question how the current system is working, but the results have not yet been so unequivocally bad as to persuasively argue for immediate, radical reform.

For all of the above reasons, we think that the time for a comprehensive revision may simply not be ripe. Phrased differently, we worry that a cure just now might be worse than the disease.

A proper legislative solution to the issues raised by Comcast should entail a thorough review of every potentially relevant obligation, and thus of all of Title II. This is not a job that lends itself to a partial or fragmentary solution.

On the other hand, we see ample scope for legislative action to address the various issues raised in the National Broadband Plan. For example, the proposal that the FCC auction broadcast spectrum on behalf of broadcasters who wish to do so, and return a portion of the financial proceeds of the auction to the broadcasters, is a reasonable approach that the FCC probably cannot undertake solely on its own initiative under present law. There is good reason to think that this could work, partly because similar approaches have already been shown to be workable in the U.S. This is a good example of a narrower and more targeted legislative initiative that could be undertaken without a deep re-thinking of the Communications Act.

6. Specific implications of the Third Way

As previously noted, the analysis by FCC General Counsel Schlick proposes to forbear from all but six sets of obligations: sections 201, 202, 208, 222, 254, and 255, respectively. Are these the right obligations? Does forbearance from all other obligations represent a coherent policy solution?

The answer to this question depends methodologically on two things:

- An assessment, at a policy level, as to which obligations should pertain to broadband access service providers; and
- A comprehensive analysis of all sections of the Act as amended.

The policy assessment appeared in Section 4 of this paper; the detailed analysis of the text of the Act appears as an Annex at the end. The results of that analysis are summarised in this section. In the interest of keeping the analysis manageable, we have addressed only sections 201 to 276 of the Act, comprising Title II. It is likely that there are numerous additional interactions with other sections of the Act.

To begin with, it seems to us that the reality is vastly more complicated than the Schlick memo would lead one to believe.

Before proceeding, we should note that the Communications Act of 1934 as amended is infernally complex. The sections interact with one another in complicated ways. The analysis presented here should therefore be viewed as preliminary and fragmentary at best. There will certainly be gaps, and there may be errors in what follows. But with that said, we proceed section by section, starting at the beginning.

Sections 201 and 202 require charges and practices and charges to be just and reasonable, and prohibit unreasonable discrimination. These are not applicable to broadband Internet access today (as an information service), but would become relevant to the transmission portion of broadband Internet access under the Third Way reclassification. From the point of view of the FCC's interest in this proceeding in the first place (enforcement of network neutrality rules), it is clear that these must be applicable to broadband operators for the proposed change to achieve its stated ends. Whether the ends are appropriate and the means proportionate, all things considered, is a separate discussion.

Sections 203, 204 and 205 require network operators to file tariffs, and empower the FCC to challenge prices that are not viewed as just and reasonable. They represent a possible *ex ante* means for the FCC to enforce the requirements of sections 201 and 202, but not the only possible means, and not necessarily the best. The FCC has in many cases exempted network operators in segments deemed to be sufficiently competitive from obligations to file tariffs. If anticompetitive price or quality discrimination is expected to be an occasional or sporadic problem, rather than endemic, then a purely *ex post* approach (penalising bad behaviour after it happens) could be sufficient. Forbearance from these sections could then be reasonable. That judgment should rest on (1) a more detailed understanding of likely competitive harms, and (2) a realistic determination as to whether it is possible to craft realistic rules or guidelines to distinguish between permissible price and quality discrimination versus impermissible anticompetitive discrimination. Neither assumption is trivial.

Sections 206, 207, 208, and 209 make it possible for third parties to complain to the FCC over alleged violations of rules, for third parties to pursue litigation, and for the

FCC to order payments to third parties where it has determined that infractions have occurred. The Austin Schlick memo proposes to forbear from sections 206, 207, and 209. Our sense is that this forbearance effectively guts these protections. First, it would undermine the FCC's own ability to enforce the Act and its own rules. Second, and perhaps even more significant, forbearance from sections 207 and 209 would effectively prevent third parties from seeking recovery through private suit.

The experience of the past ten years has demonstrated that the political party that controls the White House can simply choose not to enforce laws and rules with which it does not agree, and to disregard complaints file by third parties – this was largely the case with Computer II and Computer III. There is a mechanism for compelling Federal officials to perform their statutory duties, but the practical obstacles, cost and delay inherent in obtaining a Writ of Mandamus are prohibitive. Thus, there is a strong likelihood, even in the absence of a formal rule change, that enforcement of provisions such as sections 201 and 202 would reverse every time that control of the White House flips. In terms of regulatory certainty, this is clearly a perverse and inappropriate outcome. Retention of the protections in these sections, especially section 207, provides an alternative means of enforcement, and should in our view be retained.

Several sections of the Act enable the FCC to obtain information from providers of telecommunications services. Section 211, for example, requires carriers to file contracts with the FCC. Section 215 may be overly intensive, but enables the FCC to review carrier transactions. Section 218 empowers the FCC to make inquiries as to management practices and technological development on the part of the carriers. Section 219 requires the filing of annual reports. Section 220 empowers the FCC to specify the form of records kept by carriers, and to impose a uniform system of accounts. Limitations on these powers may be appropriate, but their elimination would seem to be ill-advised. The FCC may have investigative authority elsewhere in the Act, but explicit forbearance from obligations to provide information to the FCC could well undermine its ability to properly investigate complaints.

A number of sections of the Act enable the FCC to obtain information about the assets and costs of a telecommunications service provider. These provisions are not applicable to (most) providers of broadband Internet service today.[43] This information is unlikely to be relevant to network neutrality concerns; however, the FCC is also proposing to extend universal service to cover broadband Internet access. At that point, it will be important to understand the assets and the costs of network operators in order to determine an appropriate level of subsidy.[44] It is difficult to see how to do this in the absence of an understanding of a network operator's assets and costs. Forbearance in the case of broadband Internet access providers that are not ETCs might be possible.

Section 214 is among the provisions from which the Schlick memo proposes to forbear. This is presumably an error, since the Schlick memo proposes to retain section 254, which implements universal service. The means by which a network operator is designated as an Eligible Telecommunications Carrier, and thus eligible for subsidy, is

[43] Here, as elsewhere, we note that this is the more common case. A large number of (mostly rural) carriers voluntarily choose to offer broadband as a telecommunications service. Their collective market share is small, but the number of network operators may be large.

[44] If there were sufficient competition in the last mile, and if a reverse auction mechanism were in place for determining the Eligible Telecommunications Carrier (ETC), an understanding of costs might not be as critical. It is difficult to see how this could be implemented under current law.

through section 214(e). In the absence of 214(e) or a replacement mechanism, section 254 cannot possibly function.

Other portions of section 214 require notification and approval before a network operator can cease operation. As the Internet becomes increasingly vital to society, and in light of the fact that most Americans have a choice of only two operators, it seems to us to be entirely appropriate that these provisions apply to (large) providers of broadband Internet access, perhaps subject to constraints as to how long a provider could be required to continue service. Forbearance would appear to be ill-advised.

Section 216 states that the trustees and receivers (presumably in the event of a bankruptcy) are subject to the provisions of the Act; section 217 says that carriers are fully responsible for the acts of their officers, agents, and employees (to the extent that they are acting in their official capacity). It is hard to imagine what forbearance from these provisions would signify. Is it anticipated that broadband Internet access providers should *not* be responsible for the actions of their employees?!?

Section 222 establishes obligations for carriers to protect confidential customer data. This would appear to be no less relevant to broadband Internet access. The Schlick memo also includes this section among those to be retained.

Several sections seem to be relevant only to voice services. A reclassification of broadband Internet access would have only a tangential relevance to these sections, with or without forbearance. Among these are sections 223, 225, 226, 227, and 228.

Section 224 is concerned with providing access under regulated rates, terms and conditions, to poles, ducts, and other civil infrastructure. The obligations are relevant to gas, electric, and other public utilities, and also (through section 259) on Incumbent Local Exchange Carriers. A reclassification of broadband Internet access would not necessarily impose the obligation on additional parties, but it would make it possible for competitive broadband providers to formally request access (without the added transaction cost of going through a carrier third party).

Section 251(a) represents an obligation on all carriers to interconnect. This topic has been intensely debated over the years, but to date an obligation to interconnect has not been convincingly demonstrated to be necessary.

Sections 251(b) and 251(c) provide additional access and interconnection obligations. The long term determination as to appropriate policy in regard to these obligations is one of the most important decisions in US telecommunications regulatory policy. Its outcome should not be pre-judged as part of a much narrower concern over network neutrality. We believe that the appropriate decision for now is to retain the status quo, but in such a way as not to predetermine a long term outcome either way.

Section 254(d) obliges carriers to make payments in the universal service fund (USF). As previously noted, the FCC has already exercised discretionary authority to require broadband providers (and also VoIP providers) to also make payments. Thus, the reclassification might very slightly strengthen the FCC's legal position, but otherwise would have no effect.

Section 254(e), however, is another story. Section 254(e) enables payments to ETCs. The FCC is proposing to expand the scope of universal service to include broadband, and we consider this to be timely and appropriate. Under section 214(e), it is difficult to see how a broadband provider could become an ETC without first being classified as a

provider of telecommunications services (i.e. a carrier). Thus, these sections should be effective, and should not be forborne.

Section 255 requires manufacturers, as well as providers of telecommunications services, to make their equipment and services usable by individuals with disabilities "if readily achievable". The Schlick memo proposes that this provision not be forborne, and we do not disagree; however, the degree to which broadband usability by those with disabilities is "reasonably achievable" is by no means clear.

Section 256 gives the FCC a coordinating role in interconnection, and a possible role in standards formulation. This does not appear to be a hard, regulatory role. We see no reason why it would not be equally applicable to IP-based interconnection.

Section 258 relates to involuntary changes in service provider (i.e. "slamming"). Whether this is relevant to broadband in the absence of other regulatory changes is not clear.

Sections 271, 272, 273, and 274 are long-winded provisions related to transitioning from the historic breaking up of the Bell System under the Modification of Final Judgment (MFJ) to the regime of the 1996 Telecommunications Act. Large portions of these complex sections are no longer in effect. It is probably appropriate to forbear from the rest so as to avoid the risk of unintended side effects.

Wrapping up, we conclude:

- A regime based on reclassification of the transmission portion of broadband Internet access to a telecommunications service, with selective application of forbearance, is entirely workable; but
- It requires a much more comprehensive and nuanced analysis than that of the Schlick memorandum.

7. Concluding remarks

Drawing on the material presented, we would make the following observations:

- The present regime, characterised by classification of broadband Internet access as an information service and selective application of new rules using so-called Title I authority, was and is deeply flawed. A clear message of the *Comcast vs FCC* ruling is that this model has reached the end of the line – it has outlived whatever limited usefulness it might once have had.
- The most promising way forward under current law would be to re-classify the data transmission portion of broadband Internet access to be a telecommunications service, as proposed in Chairman Genachowski's Third Way. This would provide the FCC with necessary authority to move forward, and would also strengthen the underpinnings of several previous rulings that were appropriate in terms of public policy, but legally dubious under the present regime.
- We believe that the determination as to which portions of current law should be subject to forbearance requires a vastly more detailed and nuanced analysis than that which the FCC initially put forward. This paper provides at most an initial sketch of such an analysis.
- The various memoranda describing the Third Way propose to make it virtually impossible to impose regulated access obligations should they be determined, at some future date, to be appropriate. We think that this is *profoundly wrong-headed*. The competitive structure of the broadband marketplace probably has far greater significance in the long term than the issue of network neutrality. These questions deserve to be judged fairly when they are ripe, not to be prematurely pre-judged as an afterthought to a largely unrelated proceeding.
- Subject to the foregoing, we think that it is possible to craft a sound and comprehensive regulatory solution under present law following the general approach of the Third Way.
- The Congress could, in theory, provide a legislative solution that would be superior to the Third Way; however, it is equally likely, or probably more likely, that they would craft a flawed or inferior solution. More likely still is that no bill would pass for the foreseeable future. The Communications Act of 1934 is long overdue for a thoughtful, comprehensive overhaul. It needs to be streamlined and modernised. Unfortunately, this author sees no realistic prospect in the near term of rationalising the Act as it needs to be rationalised. The 1996 Act fell far short of what was needed, and in this author's view a 2010 Act would more likely than not be much worse.
- All considered, this author thinks that the Third Way is also the Best Way.

Annex: The "Third Way" and the Communications Act of 1934 as amended

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
201	Charges, practices, classifications, and regulations must be just and reasonable	Telecommunications service providers	Would become subject to the obligation.
202	No unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, services	Telecommunications service providers	Would become subject to the obligation.
203	Filing of tables of charges (tariffs)	Telecommunications service providers	Would become subject to the obligation; however, many net operators already enjoy forbearance.
204	Suspension of revised charges pending a hearing	Telecommunications service providers	Would become subject to the obligation, depending on §203.
205	FCC can prescribe just and reasonable charges	Telecommunications service providers	Would become subject to the obligation, depending on §203 and §204.
206	Liability for damages	Telecommunications service providers	Broadband providers would become liable to injured parties for damages for violations
207	Injured parties can ask the FCC to recover damages caused by violations, or can seek recovery by private suit, but not both	Telecommunications service providers	See §206. Injured parties would be able to seek to recover damages from broadband providers.
208	Third parties can complain to the FCC for violations or omissions	Telecommunications service providers	Would become subject to the obligation.
209	FCC can order a carrier to make a payment to a third party.	Telecommunications service providers	Would become subject to the obligation. See §§206, 207 and 208.
210	No prohibition on provision of free services to employees, and to the Government for defence.	Telecommunications service providers	Would become subject to the obligation; no obvious effect.
211	Obligation to file contracts with the FCC.	Telecommunications service providers	Would become subject to the obligation.

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
212	Prevents an officer or director from simultaneously serving two otherwise independent carriers.	Telecommunications service providers	Would become subject to the obligation.
213	Empowers the FCC to determine the value of a carrier's assets.	Telecommunications service providers	Would become subject to the obligation.
214(a) - 214(d)	FCC must authorise construction or removal from service of lines or other infrastructure.	Telecommunications service providers	Would become subject to the obligation. There are numerous exceptions already in place; however, the section is sometimes invoked when a carrier seeks to go out of business.
214(e)	Describes the way in which a telecommunications service provider becomes an Eligible Telecommunications Carrier (ETC), mechanisms for providing universal service (see also §254), the conditions to which an ETC is subject, and the conditions under which an ETC can stop providing universal service.	Eligible Telecommunications Carriers (ETCs)	Reclassification would make it possible for a broadband provider to become an ETC. This would make it possible for a broadband provider to receive funding from the Universal Service Fund (USF).
215	Review of carrier transactions to see if they are likely to adversely affect the service offered to the public, or if they represent exclusive dealing.	Telecommunications service providers	Would become subject to the obligation. It is not clear that these provisions have been enforced in recent memory.
216	The provisions of the Act apply to receivers and trustees of a carrier (e.g. in the event of a bankruptcy).	Telecommunications service providers	Would become subject to the obligation.
217	Carriers are fully responsible for the acts of their agents, officers, and employees acting within the scope of their employment.	Telecommunications service providers	Would become subject to the obligation.
218	The FCC can inquire into management and technology, and can keep itself current with technological developments conducted by carriers.	Telecommunications service providers	Would become subject to the obligation.
219	The FCC can require carriers to file annual reports.	Telecommunications service providers	Would become subject to the obligation.

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
220	The FCC can require carriers to keep records, and can impose a uniform system of accounts.	Telecommunications service providers	Would become subject to the obligation.
221	Defines the bounds between FCC versus state responsibilities for fixed and wireless communication.	Telecommunications service providers	Would become subject to the obligation.
222	Carriers must protect the confidentiality of customer data; however, directory information must be made available to third parties on non-discriminatory and reasonable rates.	Telecommunications service providers	Would become subject to the obligation.
223	Imposes penalties on those who make obscene or harassing telephone calls or other communications.	various	This complex section provides its own definitions. Reclassification would have no obvious effect.
224	The FCC must regulate the rates, terms and conditions of use by telecommunications service providers of any pole, duct, conduit, or right-of-way owned or controlled by a utility.	Electric, gas, water, or steam utilities, but not cooperatives.	Reclassification would not change the entities subject to the obligation; however, it would enable broadband providers to demand attachment (without having to go through a third party).
225	Requires carriers to provide Telecommunications Relay Service (translation to text) in support of those with speech or hearing impediments.	Telecommunications service providers	Would become subject to the obligation to the extent that they offer "telephone voice transmission services".
226	Establishes certain consumer protections in the case of carriers that offer operator services (live or automated services to complete a call).	Telecommunications service providers	Would become subject to the obligation only to the extent that they offer operator services.
227	Makes it illegal for individuals to place inappropriate calls to emergency services or hospitals. Prohibits mass advertising by means of auto-dialers.	various	There is only limited interaction (if any), and only to the extent that the broadband provider is provider voice services.
228	Establishes rules for pay-per-call services (premium rate services).	Telecommunications service providers	There is only limited interaction (if any), and only to the extent that the broadband provider is provider voice services.
229	This section (CALEA) requires carriers to proactively instrument their networks to enable lawful intercept (wiretapping).	Telecommunications service providers	Little change, since broadband providers have already been found to be subject to CALEA.

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
230	Exempts providers of "interactive computer services" from liability for the content of others, and for action taken in good faith to restrict access to lewd or violent content.	Telecommunications service providers	No obvious impact.
251(a)	Requires carriers to interconnect with other carriers.	Telecommunications service providers	Would become subject to the obligation.
251(b)	Requires incumbent Local Exchange Carriers (LECs) to establish reciprocal compensation (call interconnect) arrangements, resale, number portability, and to offer access to poles and rights-of-way to competitors.	Telecommunications service providers who are LECs	If they fall within the definition of a LEC, they could become subject to the obligations. The relevant definitions are voice-oriented, but some might argue that they nonetheless apply. Probably little or no impact on who is subject to the obligation, but it would enable competitive broadband operators to apply.
251(c)	Obliges incumbent LECs to negotiate a range of access and interconnection obligations, including interconnection, uunbundled local loop access, collocation, and resale.	Telecommunications service providers who are incumbent LECs	If they fall within the definition of an incumbent LEC (ILEC), they could become subject to the obligations. Incumbent LECs are already subject to loop unbundling for copper loops in connection with their voice services; thus, this might not represent a large change. Experience suggests that ILECs would establish subsidiaries to avoid new regulatory obligations for Internet access. Probably little or no impact on who is subject to the obligation, but it would enable competitive broadband operators to apply.
252	Establishes conditions for an ILEC to negotiate an interconnection agreement, or for mediation or arbitration, including prices, terms and conditions.	Telecommunications service providers	Probably little or no impact on who is subject to the obligation, but it would enable competitive broadband operators to apply.

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
253	Limits the ability of a state to prevent the competitive entry of a telecommunications service provider.	States	Broadband service providers would in principle benefit from the provision. No practical impact.
254(d)	Requires carriers to make payments into the Universal Service Fund (USF).	Telecommunications service providers and those designated by the FCC	No change in effect, since broadband providers and VoIP providers have already been obliged to pay into the USF.
254(e)	Authorises payments from the USF to Eligible Telecommunications Carriers (ETCs), as defined in §214(e).	Eligible Telecommunications Carriers (ETCs)	Since the reclassification could enable broadband providers to become ETCs, payment would for the first time become possible.
255	Requires equipment and services to be accessible to and usable by individuals with disabilities "if readily achievable".	Telecommunications service providers, and manufacturers or equipment	Would become subject to the obligation.
256	The FCC should oversee coordinated network planning for the effective and efficient interconnection of networks, and may participate in standards organisations.	Operators of networks used to provide telecommunications service	Would become relevant to this section, which implies coordination rather than regulation.
257	The FCC is to peridocially review regulations to recommend implementation or elimination of those that impede competitive market entry.	None specific	No change. It is not clear that this section has seen much use.
258	Prohibits carrier's from changing a customer's choice of carrier without the customer's approval.	Telecommunications service providers	Would in principle become subject to the obligation; however, it is not clear whether it would have any practical effect. It might possibly prohibit acquisition of an unbundled loop without the customer's authorisation.

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
259	Obliges ILECs to provide qualifying carriers with public switched network infrastructure, technology, and information, in area where the requester is an ETC. Permits, but does not require, infrastructure sharing.	Incumbent ILEC telecommunications service providers	Would create new obligations only to the extent that a broadband provider were designated an ILEC. To the extent that it pertains only to the switched network, possibly no impact. If the scope were broadened to include data networking, and if universal service were expanded to include broadband, this section might enable broadband ETCs to request ILEC facilities and information.
260	Prevents cross-subsidy of telemessaging services.	Telecommunications service providers who are ILECs	Unlikely to be relevant.
261	Reserves existing powers for the FCC and the states.		No change.
271	Prohibited ILECs that were part of the former Bell system from offering long distance services until certain competitive benchmarks had been achieved.	Telecommunications service providers who were former Bell Operating Companies (RBOCs)	Little apparent impact, since all RBOCs have long since fulfilled the competitive benchmarks. This section is sufficiently complicated that it is difficult to assess whether other provisions might not still be applicable in the absence of forbearance.
272	Requires any RBOC to perform manufacturing or certain long distance activities through a separate subsidiary, subject to non-discrimination obligations.	Former Bell Operating Companies (RBOCs)	Probably little or no impact. Restrictions on manufacturing and on long distance information services have long since lapsed. This section is sufficiently complicated that it is difficult to assess whether other provisions might not still be applicable in the absence of forbearance.
273	Restricts manufacturing activities on the part of RBOCs,	Former Bell Operating Companies (RBOCs)	Probably no impact. This section is sufficiently complicated that it is difficult to assess whether other provisions might not still be applicable in the absence of forbearance.

Section	Substance	Obligation is imposed on	Impact of reclassification on broadband providers in the absence of explicit FCC action
274	Restricts electronic publishing activities on the part of RBOCs,	Former Bell Operating Companies (RBOCs)	Probably no impact. This section is sufficiently complicated that it is difficult to assess whether other provisions might not still be applicable in the absence of forbearance.
275	Restricts alarm monitoring activities on the part of RBOCs,	Former Bell Operating Companies (RBOCs)	Probably no impact, and little current relevance.
276	Seeks to promote competition among providers of payphone services.	Former Bell Operating Companies (RBOCs)	Probably no impact, and little current relevance.